

## Criminal Procedure

### Rule 25(b)(2) - Motion after discharge of jury

#### **Commonwealth v. Gilbert**

Supreme Judicial Court, July 5, 2006

*A judge has the authority to order the entry of a finding of guilty of a lesser offense than found by the jury under Rule 25(b)(2), rather than honoring the defendant's request for a new trial under Rule 30(b).*

The defendant was convicted of murder in the first degree, and his conviction was affirmed on appeal. Twelve years later, he moved for a new trial on the ground that the jury instructions on premeditation and malice were flawed, and a Superior Court judge agreed. He set aside the jury's verdict of murder in the first degree, but rather than ordering a new trial as the defendant had requested, he *sua sponte* offered the Commonwealth the opportunity to elect whether it would accept a reduction in the verdict to murder in the second degree or whether it would seek a new trial on the original indictment. Over the defendant's objection, the Commonwealth accepted the verdict reduction.

On appeal, the defendant claimed the judge was not authorized to reduce the verdict and should have granted a new trial. The SJC disagreed. Rule 30(b) permits a judge to order a new trial "at any time if it appears that justice may not have been done." The second sentence of rule 25(b)(2), to which the 5 day time limit does not apply, similarly provides that a judge "may on motion set aside the verdict and order a new trial." The latter rule also permits a judge to "order the entry of a finding of not guilty, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint." Both rules permit a judge to act where justice may not have been done. Rule 30(b) says so explicitly, while rule 25(b)(2) says so implicitly. Either motion could have been filed by the defendant, but his selection of Rule 30(b) did not permit him to dictate the relief that is appropriate and just.